S. BALAKRISHNAN

v.

KHALID ALUMINIUM INDUSTRIES SDN. BHD.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-3-92 (92)]
1 OCTOBER 1993

APPEAL: Memorandum of appeal not filed and served within prescribed time - Application for enlargement of time by appellant - Mistake due to misconstruction of Rules of Court - Mistake of solicitor's clerk - Application by respondent to dismiss appeal as prescribed time breached - Whether period for filing memorandum of appeal is 6 weeks after service of notice in Form 141 or within 14 days after service of notes of evidence and grounds of judgment - Inordinate delay to file notice of motion for enlargement of time - Whether reasons for delay in filling memorandum of appeal are sufficient to justify enlargement of time - Order 49 r. 3A Subordinate Courts Rule 1980, O. 55 r. 2(1) and 4(3) of Rules of the High Court 1980.

This was an application dated 2 November 1992 by the respondent to dismiss the appellant's appeal as the memorandum of appeal was not filed nor served within the prescribed time. On the other hand, the appellant's solicitors by an application dated 10 June 1993 applied for enlargement of time to file and serve the memorandum of appeal. Both the applications were heard simultaneously.

Held:

[1] The two motions relate to rules governing civil appeals from the decision of the lower Courts. These rules clearly prescribe the time within which to file a notice of appeal and the memorandum of appeal and the compilation of the appeal record comprising the certified copies of the notes of evidence and the grounds of judgment. Clearly, therefore, these rules must be strictly complied with.

[2] However, in the interest of justice, the Court may extend or enlarge time if sufficient ground is shown for the delay. As to what amounts to sufficient ground (O. 55 r. 4(3) of the RHC 1980) will depend on the facts and circumstances of the particular case.

[3] The inordinate delay to file the notice of motion for enlargement of time by the appellant, approximately 10 months 20 days later does not reflect well on the appellant. To grant an extension of time at this juncture, would certainly prejudice the respondent as the respondent's notice of motion to dismiss the appellants appeal was filed earlier than the notice of motion for enlargement of time. Further, the respondent's inherent right to rely on procedural defects should not be denied and the rules of procedure must be strictly adhered to.

[4] The diverse reasons for the delay in filing the memorandum of appeal are not sufficient to justify an enlargement of time. In short there is, therefore, no material for the court to exercise its judicial discretion in favour of the appellant.

[5] In the circumstances, the appellant's notice of motion for enlargement of time was dismissed with costs. The respondent's notice of motion was allowed, in that the appellant's appeal was dismissed with costs as the memorandum of appeal was not filed nor served within the prescribed time.

[Application for enlargement of time dismissed with costs. Respondent's notice of motion to dismiss appellant's appeal allowed].

Cases referred to:

Haji Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man [1990] 3 MLJ 45 ***(refd)***
Elayachee v. Woo Siu Tip [1991] 3 MLJ 108 ***(refd)***
Shobri bin Hassan v. Ramalingam [1993] 3 CLJ 70 / [1993] 1 MLJ 263 ***(refd)***
Haji Mohamed bin Suboh v. Devadas [1981] 1 MLJ 136 ***(refd)***
Tan Chai Heng v. Yeo Seng Choon [1981] 1 MLJ 271 ***(refd)***
Gan Hay Chong v. Siow Kian Yuh [1975] 2 MLJ 129 ***(refd)***
Lee Guat Eng v. Tan Lian Kim [1985] 2 MLJ 196 ***(refd)***
Ratnam v. Cumarasamy [1965] 1 MLJ 228 ***(refd)***
Shafie b. Ahmad v. Hajjah Fatimah bt. Ahmad & 3 Ors. [1991] 3 CLJ 2217 ***(refd)***
Gatti v. Shoosmit [1939] 3 All ER 916 ***(refd)***

Legislation referred to:

Rules of the High Court, O. 55 rr. 2(1), 4(3)
Subordinate Courts Rules 1980, O. 49 r. 3A

For the plaintiff - W.M. Liau; M/s. Ng & Ong
For the defendant - R. Rajasingam (Raj Shankar with him); M/s. Rajasingam & Co.

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:

Judgment was given against the appellant on 15 January 1992 by the Sessions Court, Kuala

Kangsar, Perak. Notice of appeal was filed on 16 January 1992. On 8 June 1992, the appellant's solicitors received a letter from the Sessions Court, Kuala Kangsar, Perak dated 5 June 1992 (not Form 141), intimating that the notes of proceedings and the grounds of judgment were ready for collection on payment of the necessary fees. By letter dated 13 June 1992, the Sessions Court, Kuala Kangsar, Perak forwarded to the appellant's solicitors four copies of the notes of proceedings and the grounds of judgment (of course, after having been paid the necessary fees), and such copies were received by the appellant's solicitors on 16 June 1992. The memorandum of appeal bundled together with the record of appeal was filed on 20 July 1992 at the High Court, Ipoh, Perak. The last date for filing the memorandum of appeal was on 30 June 1992 calculated from 16 June 1992 (not from 8 June 1992 as submitted by the respondent's counsel). This means that the record of appeal incorporating the memorandum of appeal which was filed in the High Court, Ipoh, Perak on 20 July 1992 was twenty days out of time.

By notice of motion dated 2 November 1992, the respondent's solicitors applied to dismiss the appellant's appeal as the memorandum of appeal was not filed nor served within the prescribed time (see enclosure 9A). On the other hand, the appellant's solicitors applied, by notice of motion dated 10 June 1993, for enlargement of time to file and serve the memorandum of appeal till 20 July 1992 (see enclosure 24A). Both motions were heard simultaneously.

It was urged upon me, by learned Counsel for the appellant, to enlarge time for filing and serving the memorandum of appeal on the following grounds. Firstly, that the mistake was due to the misconstruction of the rules by the learned Counsel for the appellant. Secondly, that the appellant, being unemployed then, was taking steps to settle the judgment sum plus interests and costs amounting to RM39,591.38 sen. Thirdly, the appellant was undecided as to whether he would be proceeding with the appeal for fear of being saddled with the difficulty of raising the funds for the appeal and the likely costs incurred in the event his appeal was dismissed. Fourthly, the appellant has since paid the sum of RM39,591.38 sen to the respondent's solicitors. Fifthly, that there are merits to the appeal. Sixthly, learned Counsel for the appellant shifted his stand and blamed his clerk for the mistake (see the notice of motion for enlargement of time as per enclosure 24A). Seventhly, the respondent would not be prejudiced as the mistake was merely technical in nature. Lastly, the appellant has paid RM250 as security for the costs of the appeal.

Learned Counsel for the respondent urged me to dismiss the appeal forthwith as the prescribed time for filing the memorandum of appeal was breached and consequently, enlargement of time ought not to be entertained.

From the tenor of the submissions of learned Counsel for the appellant, it can be discerned that he was under the mistaken belief that the period for filing the memorandum of appeal was six weeks after service of the notice in Form 141 and he has since now realised that it should be filed within 14 days after service of the notes of evidence and the grounds of judgment by the Subordinate Courts (see O. 55 r. 2(1) of the Rules of the High Court ("the RHC"), *Haji Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45, *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108 and *Shobri bin Hassan v. Ramalingam* [1993] 1 MLJ 263). It is obvious that the learned Counsel for the appellant was confused in reading O. 49 r. 3A of the Subordinate Courts Rules 1980 ("the SCR") which was inserted on 1 August 1987 *vide* PU(A) 67/88 wherein an appellant who is represented by Counsel has six weeks to prepare the appeal record and to file it and the time is calculated from the date he is served with the notice that certified copies of the notes of evidence and the grounds of judgment are ready. The confusion would not have arisen, if, the learned Counsel for the appellant, by an exercise of diligence, read O. 55 r. 2(1) of the RHC in its proper perspective.

Parties to a suit or action must abide by the rules of procedure. No Court can conduct its business efficiently without a code of procedure. Those who run foul of the rules of procedure must face the consequences. I am fortified in my view by the following passages appearing in the judgment of Ajaib Singh J. (as he then was) in *Haji Mohamed bin Suboh v. Devadas* [1981] 1 MLJ 136 especially at p. 137:

> It has been stressed time and again that the rules of procedure must be strictly complied with by all litigants who seek remedy of any kind in a Court of law. Any litigant who disregards the rules of procedure does so at his

> peril and he cannot thereafter be heard to say that he has been denied justice in a cause or matter which might otherwise have been favourable to him but for the failure on his part to follow the rules for in such a case he has none but himself to blame for the predicament in which he may find himself.

On appeal to the Federal Court (see [1981] 1 MLJ 138 FC), Wan Suleiman FJ (as he then was) delivering the judgment of the Court agreed with the decision of Ajaib Singh J. (as he then was) and dismissed the appeal with costs. Wan Suleiman FJ (as he then was) stressed that "the decision as to what constitutes sufficient ground for the delay necessarily involves the exercise of judicial discretion".

Put in another way, it is not incorrect to say that the rules are made to be followed and it may be relaxed in the interest of justice if sufficient cause is shown. The two motions relate to rules governing civil appeals from the decisions of the lower Courts. These rules clearly prescribe the time within which to file a notice of appeal and the memorandum of appeal and the compilation of the appeal record comprising the certified copies of the notes of evidence and the grounds of judgment. Clearly, therefore, these rules must be strictly complied with. But, however, in the interest of justice, the Court may extend or enlarge time if sufficient ground is shown for the delay. As to what amounts to sufficient ground (O. 55 r. 4(3) of the RHC) will depend on the facts and circumstances of the particular case.

No two cases are the same. For example, Choor Singh J. held in *Tan Chai Heng v. Yeo Seng Choon* [1981] 1 MLJ 271, that the negligence or mistake of the appellant's solicitor was not a good ground for extension of time to file a notice of appeal (in the present motion (enclosure 24A) before me, the appellant seeks enlargement of time to file and serve the memorandum of appeal). In *Gan Hay Chong v. Siow Kian Yuh* [1975] 2 MLJ 129, the Federal Court held the view that it would be wrong to apply a general rule that a mistake by a solicitor, by itself, was not a sufficient ground for granting an extension of time to file a memorandum of appeal. The Federal Court took pains and made a distinction between a case of a failure to file a notice of appeal in time from a case of a failure to file a memorandum of appeal in time. The Federal Court said that in the former, no appeal was in existence and the Court would apply a more stringent test. Whereas in the latter situation, it was said that since the notice of appeal had been filed, there was an appeal, but there was no record for it to be heard, unless time was extended for filing it. Likewise, in *Lee Guat Eng v. Tan Lian Kim* [1985] 2 MLJ 196, the Federal Court granted an extension of time to serve the memorandum of appeal and the record of appeal on the respondent where the appellant was out of time for about 15 days.

In sharp contrast is the case of *Ratnam v. Cumarasamy* [1965] 1 MLJ 228, where the Privy Council agreed that the Federal Court had properly exercised its discretion in not granting extension of time to file the appeal record. There the appellant had not instructed his solicitor to file the appeal record until the day before the expiry of the statutory period because he was hoping for a compromise with the respondents. The Privy Council held that to justify an extension of time, there must be some material upon which the Court could exercise its jurisdiction and that the Federal Court was correct in holding that the hope of a compromise was not sufficient. K.C. Vohrah J. in *Shafie b. Ahmad v. Hajjah Fatimah bt. Ahmad & 3 Ors.* [1991] 3 CLJ 2217 in dismissing the applicant's application with costs for leave to file his petition of appeal out of time had this to say:

> The delay in the application caused by a mistake of a legal adviser does not preclude the Court from granting leave if the delay is exceptional (see *Sinnathamby & Anor. v. Lee Chooi Ying* [1987] 1 MLJ 110 where *Gatti v. Shoosmith* [1939] 3 All ER 916 and *Palata Investments Ltd. & Ors. v. Burt & Sinfield Ltd. & Ors.* [1985] 2 All ER 517 were considered). But in this case I have to take into account the inordinate delay on the part of the applicant in making out the reason for the present application for leave to file the appeal record out of time and there is no explanation given for the inordinate delay.

In *Gatti v. Shoosmith (supra)* it was held, *inter alia*, that the merits of the case or the probability of success or otherwise are not important considerations in deciding whether leave to appeal should be given. This is what Sir Wilfred Greene MR had to say:

> The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with

any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors - a misunderstanding which, to anyone who was reading the rule without the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal.

Reverting to the appellant's notice of motion for enlargement of time, even if the merits of the appeal are to be considered, I have, on perusal of the notes of proceedings and the grounds of judgment of the Sessions Court, Kuala Kangsar, Perak, come to the conclusion that the contract between the appellant and the respondent (exhibit P9) for the erection of "satu pintu gerbang kekal di batu 27.35 Jalan raya Persekutuan di Kuala Kangsar" was validly entered between the parties in the office of the district officer, Kuala Kangsar, Perak. It is a formidable obstacle to the appellant to allege that the contract was not properly executed as there was evidence that the appellant could converse in the English language and held the post of M.I.C.'s division chairman in Kuala Kangsar at the time of signing the contract. That the evidence was overwhelmingly strong as against the appellant can be seen by the reluctance of the appellant to proceed with his appeal until after an interval of twenty days. I am of the view that this delay is excessive in the circumstances.

Then again, the inordinate delay to file the notice of motion for enlargement of time (enclosure 24A) by the appellant, approximately 10 months 20 days later (calculated from 20 July 1992 to 10 June 1993), does not reflect well on the appellant. To grant an extension of time at this juncture, would certainly prejudice the respondent as the respondent's notice of motion to dismiss the appellant's appeal (enclosure 9A) was filed earlier than the notice of motion for enlargement of time (enclosure 24A) and further, the respondent's inherent right to rely on procedural defects should not be denied to him. As stated earlier, the rules of procedure must be strictly adhered to.

The diverse reasons for the delay in filing the memorandum of appeal are not sufficient to justify an enlargement of time. These reasons are mere afterthoughts for the following reasons. Firstly, the appellant's solicitors were alerted by the respondent's solicitors by letter dated 31 July 1992 (see enclosure 26) that the latter would object to the delay in filing the memorandum of appeal by virtue of O. 55 r. 2 of the RHC. Secondly, had the appellant been genuinely mistaken as to the time period for filing the memorandum of appeal, he should, through his solicitors, file a notice of motion to enlarge time within a reasonable time after receiving the letter dated 31 July 1992 (this letter was faxed to the appellant's solicitors at Fax No. 04-623604). Thirdly, it is not open to the appellant's solicitors to say that the appellant did not instruct them to proceed with the appeal as the notice of appeal was filed immediately one day after judgment was delivered. In short, there is, therefore, no material for me to exercise my judicial discretion in favour of the appellant. In the circumstances, the appellant's notice of motion for enlargement of time is dismissed with costs. The respondent's notice of motion is allowed, in that the appellant's appeal is dismissed with costs as the memorandum of appeal was not filed nor served within the prescribed time. A further ancillary order is made in that the sum of RM250 paid by the appellant as security for the costs of the appeal is to be refunded to the appellant.